UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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JEAN AZOR, *et al.*,

Plaintiffs,

v.

20 Civ. 3650 (KFP)
Telephonic Proceeding

NEW YORK CITY DEPARTMENT OF CORRECTIONS, *et al.*,

Defendants.

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New York, N.Y.
February 19, 2021
11:05 a.m.

Before:

HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES

KEENAN & BHATIA, LLC
Attorneys for Plaintiffs
BY: SONAL BHATIA
BY: EDWARD E. KEENAN

JAMES E. JOHNSON
Corporation Counsel for the City of New York
BY: DAVID S. THAYER
BY: CHLARENS ORSLAND
Assistant Corporation Counsel

(Case called; The Court and all parties appearing telephonically)

THE DEPUTY CLERK: Counsel, please state your name for the record, beginning with plaintiffs.

MR. KEENAN: May it please the Court, E.E. Keenan appearing on behalf of the plaintiffs.

MS. BHATIA: Sonal Bhatia appearing on behalf of the plaintiffs.

MR. KEENAN: And with us on separate lines are Julia Gokhberg, a litigation manager and paralegal with our firm; and Marcus Miller, who is a clinical intern with our firm. Also on the line today, separately is Mr. Anthony Medina, who is one of the plaintiffs.

THE COURT: Thank you very much and good morning to all of you.

And representing the defendants this morning?

MR. THAYER: Good morning, your Honor. This is David Thayer from the New York City Law Department on behalf of Defendant City of New York, Kisa Smalls, and Robin Collins. I am also joined by my colleague in the general litigation division at the law department Chlarens Orsland, and also joined by a volunteer in our office, Amy Gordon, who is a recent law school graduate and is kindly volunteering her time before she starts at a firm.

Thank you.

THE COURT: I have a number of people it seems to be thanking for doing their work on this case so I appreciate all of those efforts. What I would like to do now is to render the oral decision in this case and I will ask for your attention as I do that. In the course of that, though, there are a couple of housekeeping issues that I will be raising but those will be probably closer to the end of my decision.

What I would like to do, as I begin, is to echo what I believe I said at last week's oral argument, and that is that I appreciate to each of you your preparation and your presentations, written and oral, as well as the additional factual information that I have received from the witnesses in this case and information from expert witnesses including Dr. Harrington. I want to also thank the Keenan & Bhatia firm for accepting this *pro bono* representation for plaintiffs because this allows me to hear a greater number of related cases in a more efficient manner. And I do, and I hope to continue, to appreciate the dialogues that counsel are having with each other and with their clients. The most recent exchange evidenced by the letter that I received today and yesterday suggests a bit of a bump in the road in counsel's relationship. I do hope they're able to work that out and that they're able to speak with each other before speaking to me, but I also see that each side is having dialogues with their clients and that has aided me. Plaintiffs' counsel's dialogue

with the clients permits me to obtain real-time updates concerning conditions at Rikers Island, while the dialogue that defendants' counsel has had with defendants permits me to understand the background of certain policy decisions and it has allowed me to inquire, where it is appropriate, regarding the reconsideration of those decisions.

For the reasons I am about to outline, I am not granting plaintiffs' motion for preliminary injunctive relief at this time. But, with respect to certain policies that have been put forward by defendants as evidence of their understanding of and compliance with their constitutional obligations, I am also authorizing limited, targeted discovery as to how these policies operate in practice at Rikers Island, and at the conclusion of that period of discovery, I may schedule a second round of motion practice for a more limited form of injunctive relief if it turns out that these policies are not in fact being followed.

Now, as I understood from oral argument, the parties are largely in agreement regarding the applicable law so I'm going to discuss it only briefly.

In last year's decision in *New York v. United States Department of Homeland Security*, 969 F.3d 42, the Second Circuit instructed that a plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the

absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. In this regard, irreparable harm is injury that is neither remote nor speculative but actual and imminent, and that cannot be remedied by an award of monetary damages. And, that's from the same decision.

Plaintiffs here, are at least in part, asking the Court to order a change in the status quo which would be considered a mandatory preliminary injunction. The standard there is more stringent and it requires the moving party to demonstrate a substantial likelihood of success on the merits. The cases for this proposition I cite, *Yang v. Kosinski*, another 2020 decision from the Second Circuit reported at 960 F.3d 119, and *New York Progress & Protection PAC v. Walsh*, 733 F.3d 483, (2d Cir. 2013). While each of the named plaintiffs in this case is a pretrial detainee, plaintiffs also purport to represent a class of all Rikers Island inmates and that class would include both pretrial and convicted detainees. The Eighth Amendment for convicted prisoners and the Fourteenth Amendment for pretrial detainees govern plaintiffs' claims of unconstitutionality and therefore guide the Court's analysis in determining their likelihood of success on the merits. A decision where I think the Second Circuit best established this principle is *Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017). Under the Eighth and Fourteenth Amendment there is both

an objective and subjective prong to the analysis of whether an inmate's conditions of confinement are unconstitutional.

Judge Ramos, in last year's decision in *Fernandez-Rodriguez v. Licon-Vitale*, 470 F.Supp. 3d 323, spoke about this and discussed it at length. The objective propping asks whether the conditions of which the inmates complain, either alone or in combination, pose an unreasonable risk of serious damage to their health which includes the risk of serious damage to physical and mental soundness. And that is from the *Darnell* decision I just mentioned.

In a case where the inmates complain of an elevated risk of being harmed by the allegedly unconstitutional conditions, the Court must determine whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk. In other words, the prisoner must show that the risk of which he complains is not one that today's society chooses to tolerate. I am quoting here from the *Fernandez-Rodriguez* decision, and that, in turn, is quoting from the Supreme Court's decision in *Helling v. McKinney*, 509 U.S. 25 from 1993. This particular prong, the objective prong, is identically analyzed for convicted and pretrial inmates. The subjective prong, by contrast, differs slightly between the Eighth and Fourteenth Amendment analyses as discussed in *Darnell* and as discussed in *Fernandez-Rodriguez*. Let me make

clear, though, *Fernandez-Rodriguez* was in the Fifth Amendment due process context, but I believe it is equally applicable under the Fourteenth.

Under the Eighth Amendment, the inmates must show that the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. That's from the *Darnell* decision which, in turn, was quoting *Farmer v. Brennan*, 511 U.S. 825, the Supreme Court decision from 1994. The Fourteenth Amendment, however, has a less stringent showing -- only that the official knew or should have known that the condition posed an excessive risk to health or safety. And, in this context, disregard means failing to take reasonable measures to abate the unconstitutional condition. That is from the *Farmer* decision I just mentioned.

There is, separately, some claims under the Americans with Disabilities Act and the Rehabilitation Act, and in order to establish a violation under the ADA, the plaintiffs must demonstrate that they are qualified individuals with a disability; that the defendants are subject to the ADA; that plaintiffs were denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or were otherwise discriminated against by defendants by reason of

plaintiffs' disabilities. I am quoting here from *Henrietta D v. Bloomberg*, a Second Circuit decision from 2003, reported at 331 F.3d 261. And, because Section 504 of the Rehabilitation Act and the ADA impose identical requirements, Courts usually consider such claims in tandem and I will be considering them in tandem here.

Beginning with the analysis, having now just described the applicable law, I find that plaintiffs satisfy the objective prong of the constitutional analysis and, in this regard, plaintiffs and defendants raise nearly identical arguments to address the irreparable harm element of the motion for a preliminary injunction and the objective prong of their likelihood of success on the merits element and that's why I am addressing them together at this time.

Plaintiffs argue that substantially increased risk of serious illness and death always constitutes irreparable injury, even if plaintiffs have not been harmed. And that is at their briefing, page 20. The plaintiffs similarly argue that the serious nature of COVID-19 means that it stands with the roster of infectious diseases from which correctional officials have an affirmative obligation to protect detainees, thereby satisfying the objective prong. And that's from their briefing at page 21.

The defendants, for their part, concede that a vulnerable person's infection with a serious communicable

disease can constitute irreparable harm and that congregate settlings, such as jails, present unique concerns in the midst of a pandemic but they argue, nonetheless, that the wide panoply of protective measures undermines any contention by plaintiffs that any potential harm is actual and imminent. And this is from the opposition submission at page 7.

Defendants also claim that the objective prong is not met because the panoply of protective measures in place, based on experience derived from prior pandemics, ensures that incarcerated persons do not face an unreasonable risk of serious harm to their health and safety. This is at page 11 of the opposition. They argue that because there have been relatively few deaths and recent infections at Rikers are relatively low, there is no unreasonable risk of substantial harm. And, finally, they contend that plaintiffs have not substantiated that they are at a heightened risk due to medical conditions because they have not submitted any medical records supporting their claimed diagnosis. This is at page 8 and 9 of their opposition.

In reviewing this issue and resolving it, the Court has reviewed several district and circuit court decisions addressing constitutional claims involving prison conditions: In particular, because of their comprehensiveness and because of their obvious factual similarities, the Court has considered judge Kovner's decision in *Chunn v. Edge*, 465 F.Supp. 3d 168

from the Eastern District in 2020, which addressed pandemic-related conditions of confinement at the Metropolitan Detention Center or MDC in Brooklyn, and Judge Ramos' decision in *Fernandez-Rodriguez v. Licon-Vitale*, which I mentioned earlier, which case concerned pandemic-related conditions of confinement at the Metropolitan Correctional Center, or MCC, in Manhattan.

Each decision resolved a motion for preliminary injunction and each followed a multi-day evidentiary hearing. The plaintiffs in *Chunn* sought both the immediate release of a class of medically vulnerable inmates and proactive measures including screening, testing, and quarantining protocols, as well as mask-wearing and surface-cleaning protocols. The hearing testimony included medical professionals on both sides, as well as Bureau of Prisons, or BOP, personnel, and a prison management consultant. Judge Kovner also remarked that she reviewed an received thousands of pages of documents as exhibits including numerous factual declarations.

In the course of detailing the MDC's then current screening, sanitation, and sick call policies, Judge Kovner concluded the evidence establishes that, on the whole, the MDC has responded aggressively to COVID-19, implementing an array of measures that largely track CDC guidance. The record leaves open the possibility, however, that there were early lapses in implementation of these policies. And, it suggests that in

several areas, most notably relating to sick-call responses and use of isolation, the MDC has yet to fully implement the CDC's recommendations. I am quoting from this decision at page 181.

For the purposes of this segment of its analysis, this Court will focus on Judge Kovner's evaluation of the objective prong which she framed as whether petitioners have shown substantial risk of serious harm from COVID-19 at the MDC in light of the counter-measures that the facility has in place. Ultimately, she concluded that the preliminary injunction record leaves substantial reason to doubt petitioners will ultimately succeed in making that showing. The MDC's response to COVID-19 has been aggressive and has included, among other steps, massively restricting movement within the facility, enhancing sanitation protocols, and creating quarantine and isolation units. And the data, though limited, suggests that these measures have been quite effective in containing COVID-19 thus far. This is from page 201 of her decision.

The MCC plaintiffs in *Fernandez-Rodriguez* made similar arguments and sought similar categories of relief. Judge Ramos, however, concluded after the hearing, that plaintiffs were likely to meet the objective prong. In so doing he stated: The record shows, with the above guidelines in mind, that the conditions in the MCC, despite the MCC's attempts at protective measures, posed a substantial risk to the health of its inmates. Rather than having a functioning sick-call

system, the MCC admits it entirely failed to reviewed inmates' electronically-submitted complaints due to neglect in staffing of the sick-call inbox. Rather than rigorously and regularly screening inmates in quarantine or those who had been exposed to the Coronavirus, the MCC admits its staff came to rely on temperature checks and generalized inquiries ignoring half of the screening protocol recommended by both MCC's own policy and the CDC. Rather than trace the contacts of infected staff, the MCC admits that it failed to conduct the majority of these investigations. And rather than attempt to use home confinement, furloughs, and compassionate release as tools to reduce the density among the most vulnerable inmates, the prison chose not to pursue that path at all until well after the initial outbreak had subsided. Furthermore, the MCC did not provide serious rebuttal to the declarations to many of the inmates who testified that a broad spectrum of their neighbors developed symptoms of COVID-19 but never received care or isolation, sometimes despite informing guards and medical staff of their submissions. This is at page 350 and 351 of Judge Ramos' decision.

On the record before it, this Court finds that plaintiffs have met the objective prong of the constitutional analysis. Plaintiffs argue that the defendants are not doing enough to prevent both the introduction of the Coronavirus, which no one can seriously dispute poses a substantial risk of

harm -- particularly to folks with underlying co-morbidities or living situations that hamper social distancing -- into the Rikers Island complex, and that they're not doing enough to prevent the spread of the virus once it was or has been introduced.

In opposition, defendants argue that the many policies and procedures they have developed and implemented beginning in early 2020 to combat the virus are enough to reduce the risk of harm to plaintiffs and thereby foreclose a finding on the objective prong. Let me take a moment to be clear to the parties that on this record, the Court does not need to resolve the legal issue of whether DOC's compliance with its own internal policies would preclude a finding that plaintiffs have met the objective prong, and that is because there is a serious factual dispute over the efficacy and the actual implementation of defendants' proffered safety measures. And, as examples, I am comparing the Feeney declaration from the defendants, with the declarations of plaintiffs Azor-El, Barnar, and Cole. And on the current record, the Court cannot accept defendants' word that their practices are effective and are actually being implemented and, thus, it will not resolve the broader issue of whether actual implementation would foreclose a finding that the risks of which plaintiffs complain pose an unreasonable risk of serious damage to their health. This dichotomy between policy and practice was raised in plaintiffs' reply brief and

it was, the parties will recall, discussed at length during the oral argument. I do note how however, that this Court agrees with Judge Ramos that the situation at Rikers Island does not need to "deteriorate before the Court can find that conditions pose a substantial risk to inmates' health." This is from the *Fernandez-Rodriguez* decision, 470 F.Supp. 3d at 352. The issue for this Court is that plaintiffs are unable to make a sufficient showing on the subjective prong and the Fourteenth Amendment requires that DOC knew or should have known that the conditions imposed an excessive risk to health or safety and, as noted earlier, disregard -- which is another term it has used in this context -- means failing to take reasonable measures to abate the unconstitutional condition.

Courts in the Second Circuit have required plaintiffs to establish that defendants demonstrated deliberate indifference to the substantial risk of serious harm in order to satisfy the subjective prong. And this was found both by the *Fernandez-Rodriguez* decision at pages 353 and 354, and the *Chunn* decision at pages 202 to 204. I will note, however, that this is a very stringent standard and one that has not been adopted by all Circuits. In the Seventh Circuit, for example, in the *Mays v. Dart* decision reported at 974 F.3d 810 from 2020, the Seventh Circuit rejected the deliberate indifference test for pretrial detainees asserting Fourteenth Amendment violations in the analogous contact and the identical context

of the COVID-19 pandemic.

Plaintiffs argue that defendants' failure to implement the very protective measures that plaintiffs now seek is, itself, sufficient to meet the subjective prong. In this regard, plaintiffs have focused on the inadequacy of defendants' proffered reasons for failing to offer hand sanitizer and wet wipes, COVID-19 testing to staff and inmates, social distancing protocols, mask enforcement, and proper ventilation. And the defendants counter that the policies and procedures they have developed to minimize the spread of the Coronavirus, plus their extensive planning to address the virus as early as February 2020, demonstrates that they were not and could not be viewed as deliberately indifferent to the risks that the COVID-19 pandemic posed.

Arguments similar to those advanced by plaintiffs were made to, and rejected by, the Courts in *Chunn* and *Fernandez-Rodriguez*. Judge Kovner, in addition to finding that the MDC plaintiffs had failed to meet the objective prong, also found failure to meet the subjective prong, and in particular she found that the evidence shows that MDC officials have been acting urgently to prevent COVID-19 from spreading and from causing harm. They have imposed dozens of measures such as enhancing intake screening procedures for all inmates and staff; providing soap and other cleaning products to inmates at no cost; increasing cleaning of common areas and shared items;

isolating symptomatic inmates; broadly distributing and using PPE to prevent transmission of the virus; and modifying operations throughout the facility to facilitate social distancing to the greatest extent possible and abate the risk of spread. That's a quote from Judge Kovner. She further found, and I quote again, "Taken together, these and other measures indicate that prison officials are trying very hard to protect inmates against the virus and to treat those who have contracted it and belie any suggestion that prison officials have turned the kind of blind eye and deaf ear to a known problem that would indicate deliberate indifference." This is from pages 202 to 203 of her decision.

Even though, and even to the extent that the record before her demonstrated gaps in or departures from BOP's stated policies, Judge Kovner found them to be negligent errors rather than deliberate indifference. And this is at page 203 of her decision.

DOC here has implemented many of these same policies at Rikers Island and this Court cannot find a principal basis on which to distinguish the two cases on the current record. And for his part, Judge Ramos found that while MCC officials were aware of the risks to inmate health were the Coronavirus to circulate through their facility, the plaintiffs there were still unlikely to show that the officials disregarded that risk by failing to take reasonable measures to abate it. And this

is the *Fernandez-Rodriguez* decision 470 F.Supp. 3d at 352 to 355. And in part of this section Judge Ramos collected cases from other Circuits where Court of Appeals had in fact vacated preliminary injunctions on the subjective prong.

Here, in this case, the degree of planning and preventive measures that are discussed in the Yang and the Feeney declarations indicate levels of planning and concern that actually exceeded that which Judge Ramos had found to be adequate. And, indeed, while the plaintiffs in *Fernandez-Rodriguez* had argued for additional testing screening, sanitation, and hygiene protocols very similar to those sought here, Judge Ramos found that in seeking those measures, the plaintiffs had failed to show that the additional protections they seek are necessary to bring the conditions in the MCC above the constitutional minimum. And that's at page 354 of his discussion.

This Court agrees with that analysis and while it appreciated and listened very carefully to Dr. Harrington's explanation of the benefits of multiple and perhaps overlapping intervention in suppressing the COVID-19 pandemic, and while it doesn't -- it doesn't -- and I have no basis to dispute the efficacy of his suggestions, the Court cannot conclude that the failure to adopt anything less than the full slate of plaintiffs' suggestions a amounts to a constitutional violation.

Judge Ramos left open the possibility that the plaintiffs in his case would lose the battle but win the war. In particular he noted, and I am quoting from him, "Of course, the MCC may fall short in its efforts to improve its pandemic response. Should the Court be in a position to issue a final ruling on the propriety of a permanent injunction, it will consider these factors and a further developed factual record in its deliberation." That is from the decision at page 355. And, I want to make clear to the parties that I find the same and I will do in this case.

During the oral argument the Court asked Mr. Keenan to distinguish *Chunn* and *Fernandez-Rodriguez*, and he suggested that the amount of time that had passed since their issuance merited a different decision, that at a different stage of the pandemic this Court should come to different conclusions. That might be the case if DOC had been static in its response despite developments in understanding of the pandemic or had mounted only half-hearted efforts at the beginning followed by a period of inaction, but the record before me indicates that DOC's policies and responses are themselves evolving as new information comes in. That is evident in the discussions in the briefing and with the parties about the possibility of vaccination, and in the Court's colloquy with Mr. Thayer about asking his client to reconsider certain policies. For this reason, the analysis in these earlier decisions remains useful

and the record in this case supports a similar finding on the subjective prong. But I will note again -- and I suspect the parties are becoming attuned to these emphases that I am drawing -- this decision is based on this record and that record does not support a finding of deliberate indifference. Should it turn out that evidence reveals DOC's knowing or reckless failure to implement the very policies on which they rely as evidence of no deliberate indifference, the Court's conclusions could be very different.

Separately, I find that plaintiffs have failed to demonstrate a likelihood of success on ADA and Rehabilitation Act claims. They indicate and they claim that the defendants have violated the ADA and the Rehabilitation Act because certain of plaintiffs are qualified individuals within the meaning of the ADA. DOC concedes that they are subject to the ADA and defendants fail to offer reasonable accommodations in the form of measures like sanitizing wipes, hand sanitizer, and COVID-19 testing. Even were I to accept plaintiff's argument that their placement at the NIC establishes that they have a qualifying disability, I agree with defendants that plaintiffs have failed to demonstrate a causal connection between their purported disabilities -- and defendants do not concede that plaintiffs have established a qualifying disability on this record -- but their purported disabilities and the denial of any reasonable accommodation. I am noting here and I am

agreeing, at least for today's purpose, with the analysis set forth at page 25 of the defendant's opposition.

So, I am concluding today that the plaintiffs have failed to demonstrate a likelihood of success on their constitutional and their statutory claims, and for this reason I am denying their request for injunctive relief. In so doing, let me observe that the plaintiffs' motion had a mandatory component to it and a correspondingly high bar to meet. I have also attempted to balance appropriately my concerns for the safety and the well being of detainees at Rikers Island with my disinclination, absent a greater record of constitutional violation, to micro manage the operations at Rikers Island. But, in so doing, I wish to offer the following thoughts to the parties: It may be that the record before the Court was insufficient to warrant injunctive relief today but defendants are cautioned, particularly as the factual record is developed in this case, that plaintiffs may well identify genuine material disputes of fact regarding their constitutional and statutory claims, and we may ultimately find ourselves at trial on these same issues. To the extent that this knowledge, this advance warning causes defendants to continue or to resume internal discussions about appropriate COVID-19 protocols at Rikers Island, or it causes defendants to reach out to plaintiffs about mediation of these disputes, the Court would welcome these developments.

And on the issue of the factual record, which I have mentioned numerous times in this decision, I observed when I drafted this opinion that the record before me was less than those developed by Judges Kovner and Ramos, and for reasons that I will explain in a moment, I am going to authorize targeted expedited discovery on certain topics.

Plaintiffs' proposed list of safety protocols includes both policies that have been adopted, to some degree, by DOC, such as mask-wearing and the availability of free COVID-19 testing for staff and the provision of certain cleaning supplies, but also policies that have not been adopted including the distribution of hand sanitizer among detainees, the provision of disposable wipes to detainees or mandatory staff testing. These latter policy suggestions may be well-grounded from medical and public health perspectives, but for reasons similar to those suggested by Judge Ramos, this Court is not yet prepared to find their absence to be a constitutional violation. Instead, this Court is focusing on the degree to which DOC's COVID-19 policies are being followed by the staff at Rikers Island. As the Court suggested in its colloquy with Mr. Thayer, the more that defendants rely on their development and implementation of these policies to stave off constitutional challenges by detainees to the conditions of their confinement -- one moment, let me pause.

Ms. Noriega, are we still on?

THE DEPUTY CLERK: Yes, Judge. It looks like somebody else joined the line and I muted them.

THE COURT: I thank you very much.

Let me just repeat myself, and I appreciate the parties' indulgence as I do that.

As the Court suggested in its colloquy with Mr. Thayer, the more the defendants rely on their development and implementation of these policies to stave off constitutional challenges by detainees to the conditions of their confinement, the more appropriate it is for this Court to consider whether those policies are merely aspirational or have actually been put into place with appropriate penalties for non-compliance. The current record does not support a finding of deliberate indifference, but a more thoroughly developed factual record may establish defendants' deliberate indifference which might include, for example, relying on policies known to be ineffective, or by failing to implement policies that were believed to be effective.

In reviewing the record in this case, I noted considerable disputes between the parties over policies and practices regarding mask-wearing by staff at Rikers Island and the provision and use of cleaning supplies, particularly to detainees and particularly in common areas. And what I am going to do as a result of that is to order targeted, expedited discovery on these two areas. I am ordering the parties to

meet and confer and to submit to me, by February 26, one week from now, a letter addressing the scope and the schedule for this targeted discovery including a time table for the production of witness discovery and written discovery, and as appropriate, the provision of witness testimony. If the parties have disputes, they should bring them promptly to my attention. But, those are the two areas in which I would like to focus because, as I have mentioned a moment ago, these are the policies that are being put forward by DOC as evidence that they are not deliberately indifferent and I need to see what they are and whether they have been followed. When that discovery has concluded, we will meet again and we will talk about whether it is appropriate to proceed to broader, more plenary discovery or, perhaps and, whether it is appropriate to schedule a second, comparably targeted, round of preliminary injunction motion practice focused on whether and how these two preventive policies are being carried out at Rikers Island.

Now, as a separate discovery issue, I did understand from the parties that there was an interest on both sides in Court-ordered disclosure of certain medical information. I would ask you, please, to finish your discussions on that issue as well and to submit to me a proposed disclosure order on or before February 26, and that as yet another house-keeping measure, I believe that we have been in discussions with plaintiff's counsel regarding Plaintiff Cole's financial

status. I believe that's where we were with that, either plaintiffs' counsel was going to resolve the IFP -- in forma pauperis -- application materials, or to cover the filing costs. I would like that matter, if it hasn't already been resolved, to be resolved before February 26, 2021.

I want to end by thanking you for listening to that which I have just read and for your attention, but I also want to end with this point that I really hope you pay attention to and that I speak to you as much as a human being than as a Judge. I fully expect that at some point after this targeted period of discovery is concluded we will proceed to plenary discovery. I don't think that the discovery portion of this litigation will be short and, more than that, even on the limited record I have now, I don't see defendants succeeding on a motion for summary judgment, and I think, instead, that all of these issues are going to be hashed out in what I expect would be a lengthy jury trial. Nothing stops defendants here from adding to the preventive measures that they have implemented. Nothing stops defendants here from considering or reconsidering the measures proposed by plaintiffs in their motion papers. I hope we all agree, those on this call, that the concern here is to prevent the introduction and the spread of the COVID-19 virus to the detainees and to the staff at Rikers Island, and such prevention can only redound to our benefit as fellow New Yorkers. It is my hope -- it is my

expectation -- that the defendants, that the parties, focused on that shared concern and not merely on litigation strategy.

With that, I have resolved the issues that I wanted to bring to your attention and I have resolved the outstanding motion.

Mr. Keenan, I know that you have been paying very careful attention to what I have said. Is there any issue that I have left open that you wish to bring to my attention now?

MR. KEENAN: Thank you, your Honor. We really appreciate the Court bringing us together today to announce its decision and just want to thank the Court again.

There are no issues that we can think of at this time. I imagine there might be things that come up in the targeted discovery that your Honor has spoken of. The one issue that comes to the top of my mind is the ability to effectively get testimony from inmates at a variety of Rikers units to give basically a sampling of what inmates are seeing on the ground at different facilities. I know that probably isn't an issue that we can or should resolve on the record today but I want to flag that and we will, of course, work with the defendants in order to make that happen. But, we just want to make sure that we are able to talk with a reasonable number of inmates in different facilities and get declarations or short deposition testimony from them, if necessary.

THE COURT: Okay. I appreciate you calling that to my

attention because that is a very thoughtful thing to think about at this time. I am expressing, I think, a preference for declarations at this time but I would understand if the parties can make it happen where we can have short depositions so that both sides can question these individuals, this sample size as you said, I can understand how that would be effective as well.

Look. I will be waiting for you all to tell me what your disputes are. My hope remains that there aren't that many but I am here if you need them resolved.

MR. KEENAN: Certainly. Thank you, your Honor. And the reason that we might ask for a brief -- and I am talking about 15 or 20-minute -- depositions, say by Skype or by telephone is the realities of the lag time in the mail, even from lower Manhattan to get, to talk with someone on the phone, draft a declaration, send it to Rikers, have it processed through the mail system and security there, and then get it back, we are seeing a two-week turnaround on that, whereas Rikers has a system for having inmates -- obviously they can call but there is a system for them to use Skype or Microsoft Teams to have a video conference and that could be convened, with all counsel present, everybody talking with the inmate at the same time, maybe with a court reporter there, on a day's notice. So, really it is the time factor why we think it might be helpful in this instance to have a few, very short, very targeted depositions. That's what we have to say on that

issue.

THE COURT: Thank you. And, Mr. Keenan, as I always do, I appreciate the information that I don't have which is I am aware that there are delays in the mail. I see them here. I did not appreciate that you are seeing a two-week turnaround. That could potentially eat up a large chunk the period of discovery so thank you for telling me about that and I understand the issue better now.

Mr. Thayer, turning to you, sir, are there open issues that we should be resolving in this conference?

MR. KEENAN: No, your Honor. The defendants don't have anything that they would like to raise. Then, with regard to the scheduling of some sort of interchange between plaintiffs counsel and us and inmates at Rikers, we are certainly happy to talk about that and see what we can do to keep discovery moving quickly and to honor both the text and spirit of your Honor's order.

THE COURT: Thank you. I am confident that both sides will play together nicely as we put together the schedule. You will tell me any issues that arise. With that, I am going to bid you farewell, and on this very snowy Friday I wish you, as I hope I always do, safety and good health during this pandemic, I wish you well.

We are adjourned. Thank you.

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